

Chappell 74705

IN THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIE LIEBIE GARDNER, )  
Appellant, )  
vs. ) CR-04-0476  
STATE OF ALABAMA, )  
Appellee. )

(39(K) MOTION

COMES, now the appellant in the above style cause before the court pursuant to applicable rules of appellate procedures, and in-corporates consistent therewith "STATEMENT OF FACTS" complying with Rule 40(e), and 39(3)(5)(A), Ala.R.App.Pro., and state as follows:

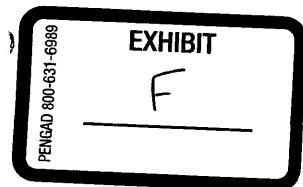
1. Your appellant was charged by the Montgomery County authorities with violation of Alabama Penal statute §13A-5-40(a)(2) Al. Code 1975.

2. Your appellant raised the following issue in the Montgomery County circuit court at issue# 1:

"IS THE CHARGING INSTRUMENT  
"THE INDICTMENT" FATALLY DEFECTIVE  
FOR FAILURE TO ALLEGE THAT PETITIONER  
INTENTIONALLY CAUSED THE DEATH OF  
ANOTHER PERSON."

3. At page 2 of the memorandum opinion incorrectly state what the appellant alleges as his claim, when it stated: "was invalid because, he alleged, it did not specify that he was charged with the killing of "another human being."

Your appellant alleged that §13A-5-40(b) makes murder as defined by §13A-6-2(a)(1) applicable to §13A-5-40(a)(2)



and that the elements of the charge as framed in the words of the statute must be averred in the indictment. The appellant alleges that he must have been charged with the intentional killing of "another person" as element of murder:

""[a] person commits the crime of murder if: (1) With intent to cause the death of another person, he causes the death of that person or of another person..."

§13A-6-2(a)(1) Ala. Code 1975.

Your appellant argued before the court that each of the components murder as defined by §13A-6-2(a)(1) and robbery §13A-6-41, and their elements must stand in the indictment independant from each other. The court cites no precedence or authority where the robbery elements in a capital murder indictment pursuant to §13A-5-40(a)(2) compensate for the failure of the state to allege the requisite elements of murder.

4. At page 4 of the memorandum opinion incorrectly state what the appellant alleges as his claim, when it stated: "Gardner claims that he was subjected to double jeopardy because the capital murder of Travis Benefield and the robbery of Ray Davis arose out of the same incident."

There exist nothing in the record beyond the District Attorney's Motion To Dismiss [R-33,34] that appellant plead guilty to robbery of Ray Davis! The state implies that the guilty plead was for an offense of robbery against Ray Davis, no where in the Supplemental Record or otherwise does the state show "...the intentional taking of property by force from Ray Davis,"

as stated in memorandum order at Page 5. as a separate requisite not required to prove in regards to Travis Benefield.

5. At page 5 of the memorandum opinion incorrectly state what the appellant alleges as his claim, when it stated: "Thus, Gardner's claim that his plea was involuntary because he did not know of the lesser-included offenses of capital murder....."

At R-26 the appellant plead as follows: "In the particular case the attorney failed to advise the defendant that the facts of this case could support the crime of felony murder rather than that of Capital Murder. "....Counsel presented to the petitioner the ABSOLUTE that he would be convicted and sentenced to death if not accept the plea of guilty;" There is no testimony that the alleged victim Ray Davis was forced to open a safe, there is evidence that appellant only intended to rob the store from state witnesses whom overheard the conversation.

THEREFORE, with premises considered your appellant herein moves that this court accepts this as established, correcting, and or modification of the statement of facts regarding this appeal.

Respectfully submitted,

Willie L. Gardner  
WILLIE LIZZIE GARDNER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal document have been served on the appellee this 1st day June, 2005 by placing the same in the United States mail postage prepaid and address as follows:

OFFICE OF THE ATTORNEY GENERAL  
Jean Paul Chappell  
11 South Union Street  
Montgomery, Al. 36130

Respectfully submitted,

Willie L. Gardner  
WILLIE LIZZIE GARDNER  
A.I.S.# 231984  
100 Warrior Lane  
Bessemer, Ala. 35023

IN THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIE LIZZLEE GARDNER,           )  
Appellant,                            )  
vs.                                    ) CR-04-0476  
STATE OF ALABAMA,                   )  
Appellee.                            )

APPLICATION FOR REHEARING

Comes now the appellant in the above style cause before the court pursuant to Rule 40, Ala.R.App.Pro., and state as follows:

1. The memorandum issued by the Court of Criminal Appeals May 20, 2005 misapprehended and overlooked an important point point of law and facts regarding the sufficiency of the indictment, as to the charge of murder; and further issued opinion in MEMORANDUM May 20, 2005 which does not address the pleads of the appellant where he alleges that<sup>at</sup> the indictment is fatally defective because of the failure to aver all of the statutory elements of ~~§13A-5-40(a)(3)~~ made applicable to the capital murder statute §13A-5-40(a)(3) by §13A-5-40(b). see brief in support.

2. The Criminal Court of Appeals in it's Memorandum Opinion issued May 20, 2005 in regards to issue II. presented to the Circuit Court of Montgomery County stated that:

"..the first degree robbery of Ray Davis required the intentional taking of property by force from Ray Davis, which was not required to prove the capital murder of Travis Benefield."

In the Circuit Court of Montgomery County failed to adequately apply the law to the issue where the record is absent of any indicia of a factual basis or colloquy besides that of the attestation of the District Attorney's in their Motion to Dismiss before the circuit court. The record in simply not complying to any of the rules governing these proceedings and Ala.R.Crim.Pro., Rule 14.4 controls all issues of facture basis and colloquy. Furthermore the factual evidence adduced at §13A-5-42 regarding the specific acts of the appellant that was known to contradict any possible plead of guilt was known by the court prior to it's imposition of sentence for the attempted murder and robbery charge. The facts adduced at the §13A-5-42 proceedings established that the appellant only removed a weapon from

another part of the store after he apparently shot Ray Davis. The record does not reflect that the appellant ever took anything from Ray Davis that was outside of the alleged capital murder component of the charge involving robbery. In fact the evidence reflected that the appellant was in another part of the store when a co-defendant shot the victim Travis Benefield point blank in the head while he was preoccupied in the back of the store with Ray Davis. Your appellant is left with the inescapable conclusion that the same property taken from the store underlining the capital offense can't support a separate offense of robbery of another person simply because they were present; with no allegations of personal ownership or possession.

Based on the evidence adduced at the §13A-5-42, proceeding the only charge that the appellant could have been charged with in connection with Ray Davis is probably 'attempted felony murder. see supplemental record on appeal.

3. Your appellant states that the circumstances of the case made it a requisite for the counsel to explain the law to his client in order for him to accurately understand his options, the case Holcomb v. State, 519 So.2d 1378, 1379 (Ala.Crim.App. 1988) is simply not applicable here! Why? Because the effective assistance of counsel is different as to the requirement of judges prior to accepting the plead of guilty according to Holcomb, yes the court had no responsibility to explain the law of capital murder to the defendant and his legal option yet counsel did.

8.

Based on the undisputed statements of the appellant in the Rule 32 Petition counsel advice did not accurately reflect the law of the capital murder procedures; appellant's counsel could not give the advice pertaining the law that his client would automatically be sentenced to death row and in view of the facts it could have justified a charge on the lesser included offense of felony murder where the appellant was not the trigger man and the issue of complicity was a question for the jury. The facts showed firmly that the appellant intent to robbery of the store, yet the facts equally would support as to his culpability that another co-defendant took undiscused or collective planned action in another part of the store to execute the victim Travis Benefield and appellant turned himself in and co-operated with law enforcement,

THEREFORE, with premises considered your appellant herein moves this honorable court to revisit it's memorandum opinion in these proceedings to serve substantial justice. opinion May 20, 2005.

Respectfully submitted,

Willie L. Gardner  
WILLIE LIZZIE GARDNER  
A.I.S.# 231984  
100 Warrior Lane  
Bessemer, Ala. 35023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal document has been served on the appellee this 1st day June 2005 by placing the same in the United States mail postage prepaid and addressed as follows:

OFFICE OF THE ATTORNEY GENERAL  
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IN THE ALABAMA COURT OF CRIMINAL APPEALS  
STATE OF ALABAMA

CR-04-0476

WILLIE LIZZIE GARDNER,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

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Willie Lizzie Gardner v. State of Alabama  
(Appeal from Montgomery County Circuit Court: CC-02-732.50)

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BRIEF IN SUPPORT OF APPLICATION FOR APPEARING

ADDRESS OF APPELLANT PRO SE:

WILLIE LIZZIE GARDNER  
A.I.S.# 231984  
100 Warrior Lane  
Bessemer, Ala. 35023

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STATEMENT OF THE CASE

I hereby incorporate and adopt the statement of case  
in initial brief to this court in brief on appeal.

STATEMENT OF THE ISSUES

ISSUE# I

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE "INDICTMENT NAMED TRAVIS BENEFIELD AS THE VICTIM OF AN INTENTIONAL KILLING. ALSO, THE INDICTMENT CLEARLY STATED THAT GARDNER "USED FORCE AGAINST THE PERSON OF TRAVIS BENEFIELD." FINALLY, THE INDICTMENT STATED ON IT'S FACE THAT TRAVIS BENEFIELD WAS A PERSON."

ISSUE# II

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE "CONVERSELY, THE FIRST DEGREE ROBBERY OF RAY DAVIS REQUIRED THE INTENTIONAL TAKING OF PROPEPTY BY FORCE FROM RAY DAVIS," AND THERE EXIST NO FACTUAL BASIS FOR THE GUILTY PLEAD OR COLOQUY.

ISSUE# III

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE APPELLANT "SPECIFICALLY, HE CON- TENDS THAT BECAUSE HIS TRIAL COUN- SEL DID NOT INFORM HIM OF THE LESSER- INCLUDED OFFENSE OF FELONY MURDER AND MURDER, AND HAD HE KNOWN THAT THERE WAS A POSSIBILITY THAT THE JURY COULD HAVE CONVICTED HIM OF ONE OF THESE LESSER OFFENSES, HE WOULD HAVE GONE TO TRIAL RATHER THAN PLEADING GUILTY. HE FURTHER CLAIMS THAT HIS ATTORNEY WAS INEFFECTIVE BASED ON HIS FAILURE TO ADVISE HIM OF THIS FACT.

STATEMENT OF THE FACTS

The appellant request that this court views his 39(K) Motion attached with this pleading as "corrected or additional" statement of facts and correct any deficiencies in it's opinion.

STATEMENT OF THE FACTS

The appellant request that this court views his 39(K) Motion attached with this pleading as "corrected or additional" statement of facts and correct any deficiencies in it's opinion.

SUMMARY OF ARGUMENT

ISSUE# I

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND THE FACTS WHEN IT STATED THE "INDICTMENT NAMED TRAVIS BENEFIELD AS THE VICTIM OF AN INTENTIONAL KILLING. ALSO, ALSO THE INDICTMENT CLEARLY STATED THAT GARDNER "USED FORCE AGAINST THE PERSON OF TRAVIS BENEFIELD." FINALLY, THE INDICTMENT STATED ON IT'S FACE THAT TRAVIS BENEFIELD WAS A PERSON."

The Court of Criminal Appeals has failed to address the would be issue of first impression before the Alabama Supreme Court according to Ala.R.App.Pro., Rule 39(a)(C), where both parties agree that such issue has not been established with no law of precedential value in which sets out the law in regards to what are the elements of murder as defined in 13A-6-2(a)(1) that constitutes the offense of murder in Alabama. Furthermore the Court of Criminal Appeals does not address the question presented by the appellant and infer that the robbery element in the capital murder charge as to "person" compensates for the state failure to aver in the language of the statute i.e. 13A-6-2(a)(1) "another person" and contrary to the facts of this case concludes that the capital murder indictment substantially tracks the language of the statute.

ISSUE# II

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE "CONVERSELY, THE FIRST DEGREE ROBBERY OF RAY DAVIS REQUIRED THE INTENTIONAL TAKING OF PROPERTY BY FORCE FROM RAY DAVIS," AND THERE

ARGUMENT

## ISSUE# 1.

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE "INDICTMENT NAMED TRAVIS BENEFIELD AS THE VICTIM OF AN INTENTIONAL KILLING. ALSO, THE INDICTMENT CLEARLY STATED THAT GARDNER "USED FORCE AGAINST THE PERSON OF TRAVIS BENEFIELD." FINALLY, THE INDICTMENT STATED ON IT'S FACE THAT TRAVIS BENEFIELD WAS A PERSON."

Your appellant was charged by the Montgomery County legal authorities with the violation of 13A-5-40(a)(2), Ala. Code 1975 and plead guilty to said offense. There are two components to section 13A-5-40(a)(2) Murder and the underlining felony of robbery. In Ex Parte Jackson, 674 So.2d 1365, at 1369 (Ala. 1994) it is expressedly clearly the capital murder offense contain two components Murder/Robbery as defined by 13A-6-2(a)(1) AND 13A-5-41, Ala. Code 1975.

The Court of Criminal Appeals has failed to address the would be issue of first impression before the Alabama Supreme Court according to Ala.R.App.Pro., Rule 39(a)(C), where both parties agree that such issue has not been established with no law of precedential value in which sets out the law in regards to what are the elements of murder as defined in 13A-6-2(a)(1) that constitutes the offense of murder in Alabama. Furthermore the Court of Criminal Appeals does not address the question presented by the appellant and infer that the robbery element in the capital murder charge as to "person" compensates for the state failure to aver in the language of the statute i.e. 13A-6-2(a)(1) "another person" and contrary to the facts of this case concludes that the capital

murder indictment substantially tracks the language of the statute.

Your appellant's chief contention is that the court has overlooked or misapprehended an important fact and principle of law which pertains to the murder component which must be spelled out in the indictment. Section 13A-5-40(b) makes all references to murder in the capital murder offense defined by 13A-6-2(a)(1):

"A person commits the crime of murder if with intent to cause the death of another person, he cause the death of that person or of another person;"

Murder is an essential component of all capital murder offenses.

"The specific form of conduct that the legislature has declared to be capital offense 'are set forth in 13A-5-40 (Supp. 1993). Each of these offense consist of an intentional murder coupled with some other element."

Ex Parte Coleman, 728 So.2d 703 (Ala.Cr.App. 1998).

When the legislature enacted 13A-5-40 and the preceding sections of 13A-5-40 with emphasis 13A-5-40(a)(2) it had already been established and existed in Alabama that the name of the victim must appear in the indictment. Andrews v. State, 344 So.2d 533 (Ala.Cr.App. 1977),

Section 13A-6-2(a)(1) made it a fundamental requisite that the element "another person" by statutory design be encompassed within the indictment; the legislative intent can be inferred by the fact that the legislature knew the law at the time of enacting 13A-5-40(b) which made 13A-6-2(a)(1) applicable to the capital murder offense.

"Court of Appeals presumes that legislature knows meaning of words it uses in enacting legislature. Steward v. State, 730 So.2d 1203 (Ala.Cr.App. 1996).

The Criminal Court of Appeals was essentially called upon for guidance in it's

judicial capacity to interpret the legislative intent due to there not being in Alabama any case law of precedential value which sets out the elements of murder as defined by 13A-6-2(a)(1), Ala. Code 1975.

"When a court is called upon to construe a statute, fundamental rule is that the court has a duty to ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained."

State v. Goldberg, 819 So.2d 123 (Ala.Cr.App. 2001).

The appellant argues that the cited case of Harrison v. State, 879 So.2d 348, 362 (Ala.Crim.App. 2003):

"An indictment is sufficient if it substantially tracks the language of the statute, provided the statute sets out the elements of the offense."

Such legal standard applied to this case is as a proposition of law ungrounded in the actual judicial analysis of the claim raised by the appellant nor does it address the facts of this appeal to this court. Whereas the court has held:

"If the indictment is framed under a statute which defines the offense created, and prescribes its constituents, it must allege in the words of the statute, or other words equivalent in meaning, all the statutory elements which are essentially descriptive of the offense."

Barbee v. State, 417 So.2d 611, at 612 (Ala.Cr.App.1962)

The Criminal Court of Appeals has not declared what the law is in reference to 13A-6-2(a)(1) as to an indictment which omits "another person" from its averments. Nor have the courts spelled out what are the statutory elements of murder as comports to 13A-6-2(a)(1).

"To declare what the law is, or has been is a judicial power; to declare what the law shall be is legislative. Const. Art. 3, 43, City of

Daphne v. City of Spanish Fort, 853 So.2d 933 (Ala. 2003).

Such ruling of the Appeals Court in view of the foregoing law stands as an arbitrary decision where it states such indictment substantially tracks the language of the statute yet gives no effect to the words or term "another person" 13A-6-2(a)(1).

"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says; if the language is not ambiguous, then there is no room for judicial construction."

Radney v. State, 840 So.2d 190 rehearing denied (Ala.Cr.App. 2002).

The law to which the Appeals court correctly cites is not conclusive as to it's judicial role in interpreting the legislative intent regarding the statute at question 13A-6-2(a)(1) as applies to 13A-5-40(a)(2) and only imbarks upon the initial step as to the sufficiency of an indictment that alleges that essential material elements of the charge has been excluded from the indictment; Where-as the court in Allred, went further an applied the law to the facts setting out the requisite elements of the offense;

"...Here, the requisite constituents of the offense which must have been set out are: that the Appellant (1) drew the check, (2) with intent to defraud, (3) knowing that there was insufficient funds to cover the check. Smith v. Southeastern Financial Corporation, 337 So.2d 330 (Ala. 1976)."

Ex Parte Allred, 393 So.2d 1030 (1980).

Harrison, supra the offspring of Ex Parte Allred, supra. and the cases of precedence arrived therefrom looks to the statute in question to establish what such statute says the elements of the offense are for the purpose of averments in an indictment, even Harrison, supra. sets out the elements of the charge in illustrating that such indictment sufficiently tracks the language

of said statute, Cogman v. State, 870 So.2d 762, at 765 (Ala.Cr.App. 2003) the case recognized "six essential elements" of 13A-8-16 that the indictment must contain. Here the court has been called upon to interpret statute 13A-6-2(a)(1) and has spelled out no essential elements of the statute and has reached the conclusion adverse to the appellant and contrary to law where the court in Ex Parte Jackson, 674 So.2d 1365, at 1367 (Ala. 1994):

"A capital offense requires an intentional killing component, it requires the intent to deprive the owner of his property, in the theft component of robbery,"

Although the case does not go out to state specifically that each components elements must be set out separately, the practical law evince that robbery stand on it's own in the indictment, and murder stand on it's own in the indictment, our Supreme Court in Ex Parte Coleman, supra, at page 9 has stated that the capital murder offense involves the intentional murder coupled with some other element. In this instance the court's opinion which allows the robbery element the use of force on the person of the victim to support the absence of the avertment that appellant intentionally caused the death of another person is fundamentally wrong and contrary to law.

ISSUE# II. HAVE THE COURT OVERLOOKED OR MISAPPROPRIATED THE POLICY OF LAW AND FACTS WHEN IT STATED THE "CONVERSELY, THE FIRST DEGREE ROBBERY OF RAY DAVIS INVOLVED THE INTENTIONAL TAKING OF PROPERTY BY FORCE FROM RAY DAVIS." THAT THERE WAS NO EVIDENTIAL BASIS FOR THE GUILTY PLEAD OR COLOQUY.

The Court of Criminal Appeals has erred in addressing the the sufficiency of the guilty plead on the attestation of the District Attorney of Montgomery County without any record in compliance with Rule 14.4(a) and Rule 14.4(b) Ala.R.Crim.Pro., and such opinion overlooked completely it's precedence of Versone v. State, 841 So.2d 312, at 314 (Ala.Cr.App. 2002).

"Without a transcript of the guilty plea colloquy, if the trial court conducted one, we cannot determine whether the appellant preserved any of these arguments for our review and we cannot determine whether the trial court had jurisdiction to accept the appellant's guilty plea."

The foregoing language of Verson, makes it a necessity for the record on appeal to compose of the guilty plead proceeding for the attempted murder and robbery conviction in order for the appellate court to determine whether the court had jurisdiction to accept the guilty plead. MOREOVER, the 13A-5-42 proceedings does not replace the trial court's duty to establish a factual basis for the attempted murder conviction and the robbery conviction.

Within the proceeding there exist nothing in the record by the appellee that sets out the requirement of Alabama Rules of Criminal Procedures, Rule 14.4. The only reference to the guilty or convictions is in the 13A-5-42 proceedings where it was adduced that Willie Lizzlie Gardner removed a weapon from the store. There exist no evidence that appellant took anything from Ray Davis separately from the robbery which formed the capital offense as charged in the capital murder indictment nor is there any specific colloquy as required by Ala.R.Crim.Pro., Rule 14.4(a).

There exist no record in the form of 'Irland Form' or 'Explanation of Rights Form' to support a guilty plead of the attempt murder and robbery 1st degree. The only testimony that could be read to encompass additional charges is the 13A-5-42 proceedings

in which testimony was provided that Willie Lizzlie Gardner shot Rahmond Davis, nevertheless nothing exist where he "took" anything from Rahmond or robbed Rahmond Davis aka Ray Davis!

There is nothing in the record before the court that an independent robbery occurred separately from the robbery underlining the capital offense. The facts in the supplemental record establishes that appellant relinquished any attempts to access the safe with Raymond Davis and took a gun which was charged in the capital indictment. see Ex Parte Sapp, 498 So.2d 550 (Ala. 1986). This court would have to vacate the robbery conviction of Ray Davis where no robbery of Ray Davis occurred separately from the capital offense. see Harris v. State, 854 So.2d 145(Ala.Cr.App. 2002) and Powell v. State, 854 So.2d 1206 (Ala.Cr.App. 2002).

ISSUE# III.

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE APPELLANT "SPECIFICALLY, HE CON- TENDS THAT BECAUSE HIS TRIAL COUN- SEL DID NOT INFORM HIM OF THE LESSER INCLUDED OFFENSE OF FELONY MURDER AND MURDER, AND HAD HE KNOWN THAT THERE WAS A POSSIBILITY THAT THE JURY COULD HAVE CONVICTED HIM OF ONE OF THESE LESSER OFFENSES, HE WOULD HAVE GONE TO TRIAL RATHER THAN PLEAD- ING GUILTY. HE FURTHER CLAIMS THAT HIS ATTORNEY WAS INEFFECTIVE BASED ON HIS FAILURE TO ADVISE HIM OF THIS FACT.

Your appellant specifically pleaded in the Rule 32 Peti- tion at R-26 the following:

"IN THE PARTICULAR CASE THE ATTORNEY FAILED TO ADVISE THE DEFENDANT THAT THE FACTS OF THIS CASE COULD SUPPORT THE CRIME OF FELONY MURDER RATHER THAN THAT OF CAPITAL MURDER."

EXIST NO FACTUAL BASIS FOR THE GUILTY PLEAD OR COLOQUY.

Within the proceeding there exist nothing in the record by the appellee that sets out the requirement of Alabama Rules of Criminal Procedures, Rule 14.4. The only reference to the guilty or conviction is in the 13A-5-42 proceedings where it was adduced that Willie L. Gardner removed a weapon from the store. There exist no evidence that appellant took anything from Ray Davis separately from the robbery which formed the capital offense as charged in the capital murder indictment nor is there any specific colloquy as required by Ala.R.Crim.Pro., Rule 14.4(a).

ISSUE# III.

HAVE THE COURT OVERLOOKED OR MISAPPREHENDED THE POINT OF LAW AND FACTS WHEN IT STATED THE APPELLANT "SPECIFICALLY, HE CONTENDS THAT BECAUSE HIS TRIAL COUNSEL DID NOT INFORM HIM OF THE LESSER INCLUDED OFFENSE OF FELONY MURDER AND MURDER, AND HAD HE KNOWN THAT THERE WAS A POSSIBILITY THAT THE JURY COULD HAVE CONVICTED HIM OF ONE OF THESE LESSER OFFENSES, HE WOULD HAVE GONE TO TRIAL RATHER THAN PLEADING GUILTY. HE FURTHER CLAIMS THAT HIS ATTORNEY WAS INEFFECTIVE BASED ON HIS FAILURE TO ADVISE HIM OF THIS FACT.

The ineffective assistance of counsel is not as complexed of a an issue to plead as the Court infers; and your appellant has plead counsel failed to explain the relevant law to his client prior to the entering of the plead. The counsel provided a position to the appellant that would only make him co-orperate with law enforcement oddly to convict other co-defendants where appellant was not the trigger man and could have been found guilty of felony murder by a jury. 26

The ineffective assistance of counsel is not as complexed of an issue to plead as the Court infers; and your appellant has plead counsel failed to explain the relevant law to his client prior to the entering of the plead. At this point counsel could not have been competent when he gave his client wrong information that he would automatically go to death row if he proceed to trial.

"...Counsel must be familiar with the facts and the law in order to advise the defendant of the option available."

Scott v. Wainwright, 698 F.2d at 429 (1983)

The appellant had the fundamental right to know the correct facts under the law:

"The question of whether a defendant intentionally caused the death of another person is a question of fact for the jury. Carr v. State, 551 So.2d 1169 (Ala.Cr.App. 1989)."

Ex Parte Carroll, 627 So.2d 874 (Ala. 1993).

Under the circumstances of making a decision on the premise that it was absolutely necessary to avoid the death chair in pleading guilty which was not the case. Another co-defendant was the trigger man on video camera while he was in another part of the store and facts were adduced at the 13A-5-42 hearing that appellant only entered the store with the intentions to rob not kill.

"Because the element of intent, being a state of mind or mental purpose, is usually incapable of direct proof, it may be inferred from the character of the assault, the use of a deadly weapon and other attendant circumstances."

Cartwright v. State, 645 So.2d 326 (Ala.Cr.App. 1994).

Counsel knew that appellant was not the trigger man of the

capital offense, and prejudice the appellant in having the jury decide intent and whether he was in fact an accomplice to the capital offense against Travis Benefield. Furthermore at the trial level he was denied the opportunity to inquire of counsel regarding the basis of his advice or statements. see Ford v. State, 831 So.2d 641 (Ala.Cr.App. 2001). Moreover, you basically have unrefuted allegations of the ineffective assistance of counsel that can only be resolved by examination of counsel under oath. "Unrefuted allegations of counsel ineffectiveness is cause for evidentiary hearing!" Lane v. State, 786 So.2d 1143 (Ala.Cr.App. 2000).

The counsel provided a position to the appellant that would only make him co-operate with law enforcement oddly to convict other co-defendants where appellant was not the trigger man and could have been found guilty of felony murder by a jury.

CONCLUSION

ISSUE# I. The appellant has called upon the judiciary to protect his fundamental rights under Ala.Const. Art. 3. sec. 43 as to the judicial primary function to say what the law is upholding the U.S. Const. and the Ala. Const. 1901. The courts application of law to a set of facts that has no relation to the particular question before the court.

ISSUE# II. There would be a travesty of justice if this court allows to stand guilty pleads that lacks any factual basis or colloquy of the guilty plead proceeding and to dispose of claims on the Motion of the District Attorney as to what the appellant pleaded guilty, lacks indicia of reliability of the process.

ISSUE# III. The court has erred on a fundamental question of federal law as to the effective assistance of counsel guaranteed by the sixth Amendment to the United States Constitution, where it was counsel AWAY to explain the law to appellant in order that he knows his options prior to entering the plead of guilt; and the law cited by the appellee and adopted by the court revolves only around the court ascertainment of if the plead is voluntarily entered.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal documents have been served on the appellee this 1st day June 2005 by placing the same in the United States mail postage prepaid and addressed as follows:

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Respectfully submitted,

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